No. 98-822 (6)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1998

FRIENDS OF THE EARTH, *et al.*,

*Petitioners,*

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

*Respondent.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

## AMICUS BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, INC., CLEAN WATER ACTION, INC., AMERICAN LITTORAL SOCIETY, DELAWARE RIVERKEEPER NETWORK, CITIZENS FOR A BETTER ENVIRONMENT, DELTA KEEPER, A PROJECT OF THE SAN FRANCISCO BAYKEEPER, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, FLORIDA PUBLIC INTEREST RESEARCH GROUP, ILLINOIS PUBLIC INTEREST RESEARCH GROUP, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, OHIO PUBLIC INTEREST RESEARCH GROUP, OREGON STATE PUBLIC INTEREST RESEARCH GROUP, AND WASHINGTON PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## INTERESTS OF AMICI

Amici parties are not-for-profit public interest organizations working to protect the environment.[1] Amici's work includes influencing environmental legislation, persuading policy makers to provide greater environmental protection, and conducting research into environmental problems. Amici agree with Justice Brennan, however, that in the end "enforcement of the law is what really counts." *Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) (Brennan, J., dissenting). Accordingly, amici parties regularly employ the citizen suit provisions of environmental laws (such as the Clean Water Act (CWA)) to enforce those laws. This central function of the amici parties is threatened by the Fourth Circuit's decision in this case.

## SUMMARY OF ARGUMENT

The Court should grant certiorari to review the Fourth Circuit's opinion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)*, 149 F.3d 303 (4th Cir. 1998) because (1) the *Laidlaw* opinion creates a split among the circuits; (2) the *Laidlaw* opinion conflicts with this Court's opinion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 66 (1987); (3) the *Laidlaw* opinion conflicts with this Court's opinions in *Tull v. United States*, 481 U.S. 412 (1987), and other cases discussing the deterrent value of civil penalties, and (4) the *Laidlaw* opinion eliminates a remedy authorized by Congress in the Clean Water Act (CWA).

(1) Until the Fourth Circuit's opinion in *Laidlaw*, every circuit to have considered the effect of a defendant's alleged post-complaint compliance on the availability of civil penalties under the CWA has applied mootness principles to determine whether penalties remain available. The first, second, third, fifth, seventh, eighth, and eleventh circuits have all followed

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[1] The parties to this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37(6), counsel for amici states that no counsel for any party to the Petition for Certiorari authored this brief in whole or in part and no person or party, other than amici, made a monetary contribution to the submission of this brief.

this Court's suggestion in *Gwaltney, supra,* that a *post*-complaint claim of mootness by a defendant based on compliance with the CWA must meet a "heavy burden" to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66.

The Fourth Circuit in the instant case, however, declined to apply the mootness analysis of *Gwaltney*, and instead applied the *standing* analysis used by this Court in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). By applying standing principles (which are intended to evaluate whether a plaintiff may invoke a court's jurisdiction at the time the complaint is filed), rather than mootness principles (which are intended to analyze whether a defendant's *post*-complaint conduct has deprived a court of jurisdiction that is otherwise present), the Fourth Circuit put itself at odds with every other circuit that has considered the issue.

(2) The Fourth Circuit's opinion also conflicts with the *Gwaltney* opinion itself. *Gwaltney* presented the Court with facts remarkably similar to *Laidlaw*. Plaintiff in *Gwaltney* did not seek injunctive relief because the defendant had not violated the CWA since the complaint was filed. Defendant argued that the CWA only allowed citizen suits when a defendant was "in violation" of the Act at the time a complaint was filed. The Court held that so long as a complaint alleged in good faith that a defendant was "in violation," any claims by a defendant that post-complaint events had eliminated a "case or controversy" should be evaluated under traditional principles of mootness. *Gwaltney, supra*, 484 U.S. at 66. The Court did *not* hold that civil penalties (the only remaining remedy for plaintiffs) would not "redress" plaintiffs' injuries.

Although the *Gwaltney* opinion was briefed to the *Laidlaw* panel, the panel did not discuss *Gwaltney*. Instead the panel applied the standing analysis of *Steel Company* and dismissed *Gwaltney* with a "but see" reference. By applying the *pre*-complaint standing analysis of *Steel Company* rather than the *post*-complaint mootness analysis of *Gwaltney*, the *Laidlaw* panel shifted the burden of proof from the defendant to the



plaintiff, and shifted the nature of the inquiry from one examining the defendant's conduct to one examining the plaintiff's qualifications.

Had the *Laidlaw* panel followed *Gwaltney* and applied mootness principles, it would have concluded that this case is not moot. Defendant's alleged post-complaint compliance consisted of easily reversed actions. Defendant had taken these actions (adjusting mercury flow) in the past, only to later resume violating its permit. Furthermore, claims for civil penalties are not moot simply because the acts upon which the claims are based occurred in the past. If that were so, civil penalties could never be imposed in citizen suits, because penalties by their nature can only be imposed for past conduct.

(3) The Court has long recognized that civil penalties deter future misconduct. In *Tull v. United States*, 481 U.S. 412 (1987), the Court stated: "The legislative history of the [CWA] reveals that Congress wanted the district court to consider the need for retribution and deterrence . . . when it imposed civil penalties." 481 U.S. at 422. *See also Hudson v. United States* ___ U.S. ___, 118 S. Ct. 488, 494 (1997) ("all civil penalties have some deterrent effect."). The *Laidlaw* opinion reads the Court's *Steel Company* opinion as eliminating consideration of the deterrent value of penalties when considering whether there is a "case or controversy" within the meaning of Article III. The *Laidlaw* panel stated:

> Prior to *Steel Co.* . . . this court had held that because 'penalties can be an important deterren[t] against future violations,' they could redress a private plaintiff's injury from violations even though the penalties are not paid to the plaintiff . . . Because *Steel Co.* represents 'a superseding contrary opinion of the Supreme Court,' we are required to follow it.

103 F.3d at 306, note 4. This misreading of the *Steel Company* opinion puts the *Laidlaw* panel's opinion squarely at odds with *Tull*, which not surprisingly found that civil penalties *do* deter future misconduct.

(4) The legal effect of the *Laidlaw* panel's opinion is to eliminate a remedy (civil penalties) that Congress authorized in the CWA. The practical effect of the *Laidlaw* panel's opinion

will be to eliminate private enforcement of the CWA altogether.

The citizen suit provision of the CWA, 33 U.S.C. § 1365, provides that in citizen suits to enforce the CWA, courts "shall have jurisdiction . . . to apply any appropriate civil penalties under section 1319(d) of this title." By holding that when plaintiffs seek only civil penalties there is no Article III jurisdiction to hear the claim, the Fourth Circuit has eliminated a remedy authorized by Congress. Such an outcome raises separation of powers issues that warrant review by this Court.

Perhaps more importantly, the *Laidlaw* opinion undermines the entire citizen suit provision of the CWA. The *Laidlaw* court's opinion creates perverse incentives for defendants to delay any determination on the merits of plaintiffs claims in CWA citizen suits, and come into compliance only when an opinion on the merits is unavoidable. Once a defendant comes into compliance, claims for civil penalties will be the only remaining remedy, and the case will be dismissed. Defendant can gain the economic benefit of years of post-complaint noncompliance (in addition to the benefits of pre-complaint noncompliance) without any penalty. Defendants will even escape paying plaintiffs' attorney fees, since the Fourth Circuit refused to consider whether plaintiffs' lawsuit was a causative factor in Laidlaw finally coming into compliance.

These perverse incentives for delay by defendants also create preclusive disincentives for plaintiffs to prosecute in the first instance. No reasonable plaintiff will invest years of time, effort, and expense to prosecute a case, no matter how meritorious, when the defendant can have the case dismissed at will without consequence. Where Congress encouraged citizen enforcement and authorized fee awards for prevailing plaintiffs, the Fourth Circuit has discouraged citizen enforcement and refused even to consider, when evaluating a fee request, whether such enforcement might have caused defendant's compliance.



## REASONS FOR GRANTING THE PETITION

### I. The Fourth Circuit's Opinion Creates a Conflict Among the Circuits.

Since this Court's *Gwaltney* opinion, seven circuits have addressed defenses based upon allegations of post-complaint compliance in CWA citizen suits. With the exception of the Fourth Circuit's opinion in this case, each of these circuits has held that claims for penalties in citizen suits under the CWA are *not* moot, even though claims for injunctive relief were no longer available because the defendants had come into compliance. Each of these circuits cited *Gwaltney* in reaching their conclusion. *See Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.2d 351, 356 (8th Cir. 1998) ("even if a polluter's *voluntary* permanent cessation of the alleged violations moots a citizen suit claim for injunctive relief, it does not moot a related claim for civil penalties") (emphasis in original) (citing *Gwaltney*); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *cert. den.*, 118 S. Ct. 442 (1997) ("If the violation is cured at some point while the suit is pending . . . the case nevertheless does not become moot.") (citing *Gwaltney*); *Natural Resources Defense Counsel, Inc. v. Texaco Refining and Man., Inc.*, 2 F.3d 493, 503-504 (3rd Cir. 1993) ("A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance.") (discussing *Gwaltney*); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021 (2nd Cir. 1993) ("A rule requiring dismissal of a citizen suit in its entirety based on a defendant's post-complaint compliance appears to be in conflict with the language of the Act . . . We hold . . . that a defendant's ability to show, after suit if filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot.") (citing *Gwaltney*); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990) ("[I]f the parties are able to make a valid request for injunctive relief at the time the complaint is filed, then they may continue to maintain a suit

for civil penalties, even when injunctive relief is no longer appropriate.") (discussing *Gwaltney*); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1065, n. 9 (5th Cir. 1991) ("Even had the improvements mooted the plaintiffs' action for injunctive relief, it would not necessarily have mooted the plaintiffs' action for civil penalties.") (discussing *Gwaltney*).

The First Circuit, in a pre-*Gwaltney* opinion, reached the same conclusion. *See Pawtuxent Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986), *cert. den.*, 484 U.S. 975 (1987); ("A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.").

The Fourth Circuit's *Laidlaw* opinion conflicts with the opinions of these circuits.[2] Where other circuits have recognized that the absence of injunctive relief does not moot a claim for civil penalties, and that eliminating civil penalties undermines a central provision of the CWA, the Fourth Circuit has found that the absence of injunctive relief *does* moot a

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[2] The *Laidlaw* opinion is also creating confusion and disagreement among district court opinions interpreting *Steel Company*. In *San Francisco Baykeeper v. Cargill Salt Division*, No. C-96-02161 (N.D. Cal.) (November 19, 1998), for example, the court held: "The U.S. Supreme Court in [*Steel Company*] established an absolute rule of law that if a plaintiff is not entitled to receive the penalties sought in the action, such as here, where any penalties would go to the U.S. Treasury, the plaintiff does not have standing under Article III of the Constitution to seek such penalties. . . . *See also* [*Laidlaw*]." In *Natural Resources Defense Council v. Southwest Marine, Inc.* ___ F. Supp. ___ 1998 WL 832316 (S.D. Cal) (Nov. 20, 1998), however, the court emphasized that Congress had authorized citizens to seek civil penalties in the citizen suit provision of the CWA, and held: "In the absence of clear case authority by either the Supreme Court or of this Circuit, this Court will not tread so easily on the powers inherent in the judicial branch." *Id.* at 1-2. But in *Dubois v. Department of Agriculture*, 20 F. Supp. 2d 263 (D.N.H. 1998), the court held that *because* it had enjoined the defendant from any further violations, "plaintiffs have failed to establish that the imposition of civil penalties . . . would redress any harm that the plaintiffs either have previously suffered or imminently face." 20 F. Supp. 2d at 268.



claim for civil penalties, without discussing this Court's *Gwaltney* opinion and without discussing whether its ruling will undermine enforcement of the CWA. This Court should grant certiorari to resolve the conflict.

## II. The Fourth Circuit's Opinion Is Inconsistent With The Result and the Reasoning In This Court's *Gwaltney* Opinion

The Fourth Circuit's opinion in this case incorrectly applied the standing analysis of *Steel Company*, rather than the mootness analysis of *Gwaltney*, to defendant's allegations of post-complaint compliance. The result is at odds with *Gwaltney*.

### A. The *Laidlaw* Opinion Conflicts With the Result of *Gwaltney*

The Fourth Circuit "assume[d] without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact." *Laidlaw*, Appendix A at 7a. The *Laidlaw* panel nevertheless cited *Steel Company* and concluded that "this action is moot because the only remedy currently available to Plaintiffs – civil penalties payable to the government – would not redress any injury Plaintiffs have suffered." *Laidlaw*, Appendix A at 9a. The Fourth Circuit did not discuss or apply *Gwaltney*, except to acknowledge in a footnote that the panel's decision to deny fees appeared to conflict with *Gwaltney*. Appendix A at 9a, note 5.

In *Gwaltney*, under facts nearly identical to the facts in this case,[3] the Court recognized that traditional mootness principles should be applied to allegations that post-complaint compliance has eliminated Article III jurisdiction. In *Gwaltney*, as in this case, the district court had not issued injunctive relief and the plaintiffs had not sought injunctive relief on appeal. *Gwaltney*, *supra*, 890 F.2d 690, 692 (4th Cir. 1989). Consequently, by the time the case reached this Court, the sole

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[3] Unlike *Gwaltney*, however, there is no dispute in the present case that Laidlaw's violations continued after the complaint was filed.

remaining claim was for civil penalties. Defendant argued that civil penalties alone would not redress plaintiffs' injuries, and therefore the case should be dismissed. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, Oct. Term 1987, Reply Br. for Petitioners, at 16. This is the same redressability argument that the Fourth Circuit adopted in the present case. *See Gwaltney, supra*, 484 U.S. at 66.

This Court in *Gwaltney*, however, rejected the argument, and held that if plaintiffs prove standing as of the inception of a case, courts have Article III jurisdiction to hear plaintiffs' claims, unless defendants establish mootness. *Gwaltney*, 484 U.S. at 64-66.[4] The Court's refusal to find that *Gwaltney* was moot simply because injunctive relief was not necessary was consistent with the Court's prior opinions finding that the absence of injunctive relief does not necessarily make a case moot. *See e.g., United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (even though defendant on remand might be able to show that injunctive relief was inappropriate, the case was not moot); *United States v. W.T. Grant Co.*, 345 U.S. 629, 635-636 (1953) ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief."). As the Court held in *Powell v. McCormack*, 395 U.S. 486, 496-97 n. 8 (1969): "Where several forms of relief are requested and one of those requests subsequently becomes moot, the Court has still considered the remaining requests . . . [T]he remaining live issues supply the constitutional requirement of a case or controversy."

The Fourth Circuit did not address *Gwaltney*'s mootness discussion, despite the direct relevance of that discussion.[5]

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[4] The facts that must be alleged, supported, and ultimately proven to support standing are the facts as they existed at the time the plaintiff filed its complaint and sought to trigger the court's jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, n. 4 (1992).

[5] To compound the problem, the Fourth Circuit refused to consider any application for fees and costs, without any inquiry as to whether plaintiff's suit had caused Laidlaw to come into compliance. The panel then gave a "but see" cite to *Gwaltney*. *Gwaltney*, of course, expressly recognized that "[u]nder the [CWA], plaintiffs are also protected from suddenly repentant defendant by the authority of the district courts to award litigation costs 'whenever the court determines such an award is appropriate.' " 33 U.S.C. § 1365(d). The legislative history of this provision states explicitly that the award of costs 'should extend to plaintiffs in actions which result in successful abatement but which do not reach a verdict.' " 484 U.S. at 49, note 6. The "but see" reference in the *Laidlaw* opinion to this Court's opinion in *Gwaltney* is highly unusual – the Fourth Circuit apparently recognized the conflict between its opinion and *Gwaltney*, but elected not to follow *Gwaltney*. Although the fee provisions of the Act were amended in 1987, those amendments in no way changed the underlying point of *Gwaltney*; if plaintiffs' suit causes defendants to comply, plaintiffs are eligible for fees.



Instead the Fourth Circuit based its decision on *Steel Company*. *Steel Company*, however, did not overrule *Gwaltney*. *Steel Company* involved standing, not mootness. The facts of the instant case are like those in *Gwaltney*, not *Steel Company* – the complaint here alleged continuing violations, and the Fourth Circuit assumed standing and continuing violations at the time the complaint was filed. The issue, therefore, is not whether plaintiffs had standing when they filed the complaint, but whether plaintiffs' request for civil penalties has been rendered moot by defendant's alleged post-complaint compliance.

### B. Had The Fourth Circuit Applied *Gwaltney*'s Reasoning, It Would Have Concluded That This Case Is Not Moot

*Gwaltney* recognized that post-complaint defenses that changes in facts or law have eliminated a "case" or "controversy" within the meaning of Article III are addressed through the lens of mootness. *Gwaltney*, *supra*, 484 U.S. at 66 (once jurisdiction has been established, defendant bears "heavy burden"of showing "that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.") (emphasis in original). *See also Gwaltney, supra*, 484 U.S. at 69 (Scalia, J, concurring) ("It does not suffice to defeat subject

matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the complaint is filed. Subject matter jurisdiction depends on the state of things at the time of the action brought; if it existed when the suit was brought, 'subsequent events' cannot 'ous[t]' the court of jurisdiction.") (citations omitted). *See generally, Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) ("[J]urisdiction, properly acquired, may abate if the case becomes moot . . . ") (internal quote marks and citations omitted).

While mootness and standing are related, they are not the same. This Court has described mootness " 'as the doctrine of standing set in a time frame.' " *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068-69 (1997).[6] While the two doctrines sometimes overlap, they are not identical, and this Court has consistently examined arguments that post-complaint changes have eliminated any "case" or "controversy" by applying mootness, principles, rather than standing principles. *Steel Company* acknowledged this distinction in rejecting the government's argument that a presumption of ongoing harm that applies to mootness claims should also be applied to standing claims. *See Steel Company, supra*, 118 S. Ct. at 1020 ("The 'presumption' the Government refers to has been applied to refute the assertion of *mootness* by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity . . . It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial *standing* must be based.") (emphasis added); *see also Burke v. Barnes*, 479 U.S. 361, 364 n.* (1987) ("We reject respondents' argument that the questions of mootness and standing are necessarily intertwined").

### 1. Claims for civil penalties are seldom moot

As the circuits which have followed *Gwaltney* have recognized, claims for civil penalties will seldom be moot, because

[6] *Arizonans*' involved a post-complaint change in the *plaintiff's* status, as opposed to post-complaint changes in the *defendant's* conduct.



the conduct upon which the claims are based occurs in the past, not the future. It is for this reason that the Eleventh Circuit held in *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134 (11th Cir. 1990) that "the mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed."

In *Reich v. Occupational Safety and Health Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997), the court noted that "[c]ourts have traditionally treated monetary relief claims differently than injunctive relief claims for the purpose of mootness challenges." (Citing *Powell v. McCormack*, 395 U.S. 486, 496 n. 8 (1969)). The *Reich* panel identified the practical problem with applying the same mootness test to civil penalties as is applied for injunctive relief: "Accepting the Commission's view of mootness would mean the existence of a 'case or controversy' is dependent on an employer's post-violation acts as well as the date a tribunal sets for a hearing in the proceedings. This innovative view seems to inject unneeded confusion into traditional mootness principles." 102 F.3d at 1202.[7] This is the same practical problem created by *Laidlaw*. If civil penalty claims sought by a plaintiff who otherwise has standing can be rendered "moot" by a defendant's post-complaint conduct, defendants will simply postpone compliance until a decision appears imminent, then come into compliance and move to dismiss as moot. *See* Part IV of this brief, *infra*.

### 2. The Defendant Carries the Burden of Demonstrating Post-Complaint Compliance Moots a Plaintiff's Suit

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The mootness doctrine, like that of

[7] A claim for civil penalties might become moot upon death or bankruptcy.

standing, derives from the Article III case-or-controversy requirement, but the two are not the same.

> [W]hile the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of the judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced the alleged results.

*Cardinal Chemical Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). In shifting this burden, this Court has recognized that a defendant who voluntarily halts challenged conduct only *after* being sued generally does not thereby "deprive the tribunal of the power to hear and determine the case." *W.T. Grant*, 345 U.S. at 632; *accord City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 238, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Concentrated Phosphate*; 393 U.S. at 203 ("Mere voluntary cessation of an allegedly illegal activity does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways (citation omitted).' ").

A defendant who seeks to moot a lawsuit by voluntarily halting challenged activity only after being sued must therefore carry the "heavy burden"of showing "that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66 (emphasis in original; internal quote marks omitted). This rule promotes judicial economy and fairness and "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." *Gwaltney*, 484 U.S. at 67.

This Court in *Steel Company* declined to extend the skepticism of the "voluntary cessation" rule to a pre-complaint claim of standing where the plaintiff admitted there was no likelihood of future violations at the time the complaint was filed. *See* 118 S. Ct. at 1020. In doing so, however, the Court



specifically noted that the presumption of future harm in cases of voluntary *post*-complaint cessation was developed to "refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained of activity." *Id. See, e.g., W.T. Grant*, 345 U.S. at 629, 632 (1953).

While it may be an "immense and unacceptable stretch to call the presumption into service as a substitute for the allegations of present or threatened injury upon which initial standing must be based," 118 S. Ct. at 1020, it is no stretch at all to apply the presumption in considering a mootness defense. In fact, the presumption was *developed* for this purpose. *See, e.g., W.T. Grant*, 345 U.S. at 632. The presumption of future injury recognized by this Court in *Gwaltney, Steel Company*, and *W.T. Grant* applies to the present case, but was ignored by the *Laidlaw* panel because the panel's opinion failed to acknowledge any distinction between mootness (as discussed in *Gwaltney*), and standing (discussed in *Steel Company*).

### 3. Mere "Protestations of Repentance and Reform" Do Not Demonstrate That the Controversy Is Moot

Laidlaw has not overcome the presumption of future injury in the case. One factor to consider in deciding whether a defendant has satisfied its burden is whether the defendant would have an incentive to resume its illegal activity. *Cf. Concentrated Phosphates*, 393 U.S. at 202-03 (defendants' mere assertion that the prior illegal practice was no longer economical did not suffice to moot enforcement action); *W.T. Grant Co.*, 345 U.S. at 632 (while a profession of reform is one factor to be considered, it does not suffice to make a case moot). Where a defendant has a financial incentive to resume illegal conduct, cessation of that conduct – even if accompanied by a substantial period of compliance during the lawsuit – is unlikely to make "absolutely clear" that there is "no reasonable expectation that the wrong will be repeated." *See Gwaltney*, 484 U.S. at 66-67; *see also W.T. Grant*, 345 U.S. at 632-33.

Laidlaw did not establish that its illegal behavior could not reasonably be expected to recur. On the contrary, a substantial part of Laidlaw's remedy for its violations involved its decision to reduce the mercury content of the waste it fed into its incinerator. J.A. 124. Laidlaw had reduced the mercury content in the past and subsequently increased it. Since Laidlaw could easily change its practice at any time in the future, had the Fourth Circuit properly applied mootness principles rather than standing requirements, it would have been compelled to find that the case is not moot. *Cf. Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring in part and in the judgment) ("A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of the problem has not been completely and clearly eradicated.").

#### 4. The Denial of an Injunction Is Not Equivalent to a Factual Finding That the Controversy Is Moot

The district court's decision not to enjoin Laidlaw does not mean that Laidlaw met its burden of proving mootness. Abandonment of illegal activity "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise, rather than the existence, of judicial power." *City of Mesquite*, 455 U.S. at 289. Thus, even in cases in which a court determines that an injunction is inappropriate, claims regarding future violations generally are not mooted by a defendant's "voluntary cessation of illegal activity." *Concentrated Phosphates*, 393 U.S. at 203; *see W.T. Grant*, 345 U.S. at 633-34, 635-36 ("[T]he court's power to grant injunctive relief survives discontinuance of the illegal conduct. . . . The purpose of an injunctive is to prevent future violations."); *Illinois Central R.R. Co. v. Adams*, 180 U.S. 28, 30-32 (1901) (reasoning that the court had jurisdiction, despite the respondent's argument that "the very things the bill was filed to prevent are accomplished facts, and the [petitioner] cannot be injured."



### III. The Fourth Circuit's Opinion Is Inconsistent With The Court's Opinion In *Tull v. United States* That Civil Penalties Deter Further Misconduct

The Fourth Circuit concluded that civil penalties would not "redress" plaintiffs' injuries because this Court in *Steel Company* found that "civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore the penalties would not benefit the plaintiff." 118 S. Ct. 1018-19. But this statement was made in an entirely different context. In *Steel Company*, the defendant had fully complied prior to the complaint being filed, and there was no real liklehood of future violations. The principle of "redressability," like the burden of proof, is applied differently in the post-complaint mootness context than it is in the pre-complaint standing context.

The fact that the "redressability" component of the test for standing cannot be satisfied when all violations cease prior to its filing of a complaint (*see Steel Company*, 118 S. Ct. at 1019) does not mean that plaintiffs who *have* standing to initiate a suit cannot obtain civil penalties if injunctive relief becomes inappropriate after the complaint is filed. As *Steel Company* specifically noted: "[I]f respondent had alleged a continuing violation or the imminence of a future violation," then judicial relief designed to deter future violations would "remedy that alleged harm." 118 S. Ct. at 1019.

The Court has consistently recognized that penalties, and the threat of penalties, including CWA penalties, deter future misconduct by persons who are, or may be, penalized. *See Tull v. United States*, 481 U.S. 412, 422-423 (1987) ("[The Court] may also seek to deter future violations by basing the penalty on its economic impact."). *See also Hudson v. United States*, ___ U.S. ___, 118 S. Ct. 488, 494 (1997) ("all civil penalties have some deterrent effect."); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (stating that "civil penalties . . . deter certain behavior."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (explaining that an injunction is not the only means of ensuring compliance, for instance, the Clean Water Act itself provides for fines and criminal

penalties). *See generally* D. Epple & M. Visscher, *Environmental Pollution: Modeling Occurrence, Detection, and Deterrence*, 27 Jrnl. L. & Econ. 29, 56 (1984) (empirically linking penalties and deterrence).[8]

The *Steel Company* holding that imposing civil penalties on a defendant who comes into compliance before a complaint was filed will not "redress" past harms does not implicitly overrule the established law and common sense principle that penalties imposed on a defendant who continues to violate the law after a complaint is filed will deter future violations by that defendant. The Fourth Circuit's indiscriminate application of the *Steel Company* deterrence discussion is inconsistent with this Court's decisions in *Tull* and *Weinberger*. When compliance occurs only after a complaint has been filed, as in the instant case, civil penalties deter the very defendant who engaged in past violations. *See Weinberger*, 456 U.S. 305 at 314; *see also Tull*, 481 U.S. at 422-423 (citing 123 Cong. Rec. 39191 (1977)) ("Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties [under the Clean Water Act]."). It was for this reason that Congress empowered district courts to "seek to deter future violations by basing the penalty on its economic impact [to the defendant]." *Tull*, 481 U.S. at 423.

Deterrence in the context of post-complaint compliance differs from deterrence in the context of pre-complaint compliance in at least three ways. First, where there is a continuing post-complaint threat of violation, penalties deter not only the general class of violators, but also the individual violator that is the subject of the lawsuit. Second, the defendant who continues violating even after a complaint is filed is in greater need of deterrence, while a violator who complies after receiving a notice of violation does *not* need to be deterred (in fact,

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[8] In fact, civil penalties may have a *greater* deterrent value than injunctive relief. If violators, especially those that complied only after a lawsuit was filed, "faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).



others should be encouraged to act similarly). Third, the deterrence of a specific violator benefits the plaintiffs, who have been adversely affected by past violations and would be adversely affected by future violations. Thus, in the post-complaint context, a plaintiff receives more than merely "psychic satisfaction." *See Steel Company*, 118 S. Ct. at 1019.

Applying an analysis of "deterrence" and "redressability" in the mootness context that differs from the analysis applied in the standing context is consistent with the Court's differential treatment of burdens of proof and presumptions in these contexts. It is also consistent with the Court's more expansive treatment of remedies generally, once it has satisfied itself that a plaintiff has standing.

In *Warth v. Seldin*, 422 U.S. 490, 501 (1975), for example, the Court held that so long as Article III standing requirements were met, "persons to whom Congress has granted a right of action . . . may have standing to seek relief on the basis of the legal rights of others, and, indeed, may invoke the general public interest in support of their claim." Analyzing redressability and civil penalties differently in a post-complaint setting than in a pre-complaint setting is consistent both with *Warth* and with the pre- and post-complaint distinction made by the notice requirement of the CWA's citizen suit provision. Such a distinction also allows the Court to account for the congressional goal of encouraging private individuals to protect public resources. A more expansive post-complaint analysis of redressability is also consistent with our common law heritage of private enforcement of public rights, in which *qui tam* actions, common informer laws, and public nuisance rights were widely recognized, and individual enforcement of community rights "was common because there was no well developed conceptual distinction between public and private functions." Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suites Under Federal Environmental Laws*, 34 Buff. L. Rev. 833, 952 (1984). *See also NAACP v. Button*, 371 U.S. 415, 429 (1963) (recognizing the legitimacy of citizen enforcement of non-economic public rights); *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (Congress may authorize private

citizens to enforce public rights, so long as private litigants' interests are sufficiently affected to create justiciable controversy) (coining the term "private attorneys general"). *See generally* G. Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 Envt'l. L. Rep. 10028 (January, 1989).

## IV. The Fourth Circuit's Opinion Raises Separation of Powers Concerns Because It Eliminates A Remedy Authorized By Congress And Undermines The Citizen Suit Provision Of The CWA

Congress authorized private citizens to seek civil penalties when enforcing the provisions of the CWA. 33 U.S.C. § 1365. The Fourth Circuit's conclusion that penalties do not "redress" the harm suffered by plaintiffs in otherwise properly initiated citizen suits conflicts with Congress' determination that such penalties *do* address the harm suffered by citizen plaintiffs.[9] Congress' fact (and policy) determinations are entitled to substantial deferrence. *Preseault v. Interstate Commerce Comm.*, 494 U.S. 1, 17 (1990). The courts should not lightly eliminate remedies created by Congress; doing so implicates separation of powers concerns. *See Davis v. Passman*, 442 U.S. 228, 241 (1979) (Congress decides "who may enforce [statutory rights] and in what manner."). This is particularly true in the Article III context. Article III limits the courts' power, not Congress'.[10]

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[9] The perfidy of the Fourth Circuit's opinion is illustrated by the district court's opinion in *Dubois v. Department of Agriculture*, 20 F. Supp. 2d 263 (D.N.H. 1998). In *Dubois* the court enjoined the defendant from further violating the CWA, then found that its own injunction made plaintiffs' request for civil penalties "moot," citing the Fourth Circuit's opinion in the instant case. 20 F. Supp. 2d at 268-70.

[10] It is not unusual for the Court to consider related questions of justiciability differently depending upon whether a statutory provision is involved or not. In evaluating standing, for example, the Court has recognized that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Article III's requirement remains . . . ." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).



By finding that plaintiffs may not seek civil penalties, even in properly initiated enforcement actions, the Fourth Circuit has as a practical matter eviscerated the entire citizen suit provision of the CWA. As the Second Circuit noted in *Atlantic States Legal Foundation v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-21 (2nd Cir 1993):

> A rule requiring dismissal of a citizen suit . . . based on a defendant's post-complaint compliance appears to conflict with the language of the Act. Under such a rule, a penalty suit would *always* become moot and a defendant would escape *all* liability if it could show, at any time before judgment, 'that the allegedly wrongful behavior could not reasonably be expected to recur.' *Gwaltney* I, 484 U.S. at 66, 108 S. Ct. at 386. Yet, as the Fourth Circuit noted in *Gwaltney III*, section 1319(d) of the Act provides that any person who violates effluent limitations or permit conditions '*shall* be subject to a civil penalty.' 890 F.2d at 697. Allowing a discharger to escape all liability by virtue of its post-complaint compliance cannot be squared with this mandatory language.
>
> In addition, we agree with the Eleventh Circuit's view . . . that mooting an entire suit based on post-complaint compliance would weaken the deterrent effect of the Act by diminishing the incentives for citizen plaintiffs to sue and by encouraging defendants to use dilatory tactics in litigation. Pan American suggests, however, that disallowing civil penalties when a defendant comes into compliance after a complaint is filed will not significantly diminish the incentives for citizens to bring suit because they can still recover attorney fees. Pan American further suggests that because any penalties imposed go to the United States Treasury (Treasury) and not to the citizen plaintiff, the pursuit of these monies

> cannot provide an incentive. We disagree. Citizen plaintiffs often initiate suit not to recover monetary awards for their own benefit, but rather to ensure that penalties are imposed so as to deter future violations.

The perverse incentives created by the Fourth Circuit's decision in this case undermine the purpose of the citizen suit provision of the CWA and, as with the civil penalty provision of the CWA, raise separation of powers concerns. *See, e.g., TVA v. Hill*, 437 U.S. 153, 194 (1978) (it is "the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation.").

## CONCLUSION

The Fourth Circuit has created a conflict among the circuits of the federal court of appeals by wrongly applying this Court's standing analysis in *Steel Company* to a case in which violations continued even after the complaint was filed. The Fourth Circuit should have applied this Court's mootness analysis in *Gwaltney*, as all other circuits have under similar facts. Post-complaint voluntary cessation of illegal activity does not moot a plaintiff's claims for relief, unless the defendant carries the heavy burden of proving that the change makes absolutely clear the wrongful behavior could not be expected to recur. The defendant in this case has not met that burden. The Fourth Circuit's opinion eliminates a remedy authorized by Congress, undermines a key provision of the CWA, and should be reviewed under a writ of certiorari.

Respectfully submitted,

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